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No. 90-1670

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In the Supreme Court of the United States

OCTOBER TERM, 1991

KATHLEEN E. CONNORS, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a decision of a court of appeals that explicitly adopts a *de novo* standard of review for all issues of law is consistent with *Salve Regina College* v. *Russell*, 111 S. Ct. 1217 (1991), which holds that determinations of state law by district courts are subject to *de novo* review.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1–20, is reported at 919 F.2d 1079. The opinion of the district court, Pet. App. 25–102, is reported at 720 F. Supp. 1258.

JURISDICTION

The judgment of the court of appeals, Pet. App. 21, was entered on January 2, 1991. A petition for rehearing was denied on January 29, 1991. Pet. App. 23–24. The petition for a writ of certiorari was filed on April 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 2, 1985, a passenger plane operated by petitioner Delta Air Lines (Delta) crashed during a se-

vere storm at Dallas-Fort Worth International Airport. The crash killed 128 passengers and eight crew members. A number of suits were filed against Delta in various state and federal courts. The federal suits were consolidated for pretrial purposes and were transferred to the District Court for the Northern District of Texas.

During the course of the federal litigation, Delta sued respondent United States as a third-party defendant under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* Delta asserted that the crash had been caused in part by the negligence of federal air traffic controllers and National Weather Service meteorologists. The United States was sued on the same basis by petitioners Connors and Nassick, the widows of two members of Delta's flight crew. After the completion of pretrial discovery, the district court returned the transferred suits to the transferor forums but retained jurisdiction over petitioners' claims against the United States.

After a 14-month trial, the district court entered judgment in favor of the United States. Pet. App. 25–102. The district court found that Delta's flight crew was negligent and that the flight crew's negligence proximately caused the crash. *Id.* at 73–88. Although the court also found that the federal air traffic controllers and meteorologists were negligent in failing to provide the flight crew with weather information, *id.* at 96–100, it went on to find that their negligence was not a proximate cause of the crash, *id.* at 100–101. The court found specifically that "the [flight] crew * * * possessed substantially all of the weather information potentially available from government sources" and that the federal employees' failure to pass on weather information was "inconsequential" because "there is no evidence that the crew would have acted differently with this confirmation of information already known." *Id.* at 101.

2. On appeal, petitioners did not contest the district court's findings that the Delta flight crew was negli-

gent and that the flight crew's negligence was a proximate cause of the crash. Petitioners instead raised a number of objections to the district court's finding that the government's negligence was not a concurrent proximate cause of the crash.

Petitioners argued that the district court improperly relied on the law of Louisiana rather than the law of Texas in deciding the proximate cause issue. Pet. App. 13–14.[1] Petitioners also argued that the district court treated the flight crew's negligence as a "new and independent cause" of the crash, while Texas law permits only the act of a non-party to be treated as a new and independent cause. *Id.* at 14. Petitioners further argued that the district court relied on the doctrines of "last clear chance" and "discovered peril," which had been repudiated by the Texas Supreme Court. *Ibid.* Finally, petitioners argued that the district court should have employed an "objective standard" of proximate cause, asking not how the government's omissions affected the negligent Delta flight crew but instead how they would have affected a hypothetical "reasonably prudent" flight crew which was unaware of the actual weather conditions. *Id.* at 15.

The court of appeals unanimously rejected petitioners' arguments and affirmed the judgment of the district court. Pet. App. 1–22. At the outset, the court of appeals addressed the proper standard of review for the proximate cause issue. *Id.* at 12. The court stated that "the [district] court's ultimate determination of proximate cause * * * is a finding of fact that is reviewable under the clearly erroneous standard." *Ibid.* However, the court added that "the law applied by the district court [in making the proximate cause determination]

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[1] Under the Federal Tort Claims Act, the liability of the United States is generally determined "in accordance with the law of the place where the [negligent or wrongful] act or omission occurred." 28 U.S.C. 1346(b). In this case, the allegedly negligent acts and omissions of the federal employees occurred in Texas.

is reviewable *de novo*." *Ibid.* The court subsequently reiterated this point, stating that "[w]e review * * * claims of legal error *de novo*." *Id.* at 15.

Employing this standard of review, the court of appeals rejected each of petitioners' objections to the district court's proximate cause determination. The court turned first to the claim that the district court had employed Louisiana law rather than Texas law, a claim that the court of appeals characterized as petitioners' "most serious contention." Pet. App. 15. Pointing out that the district court had explicitly identified Texas law as the law governing petitioners' claims under the FTCA, see *id.* at 71–73, the court of appeals declined to infer that the district court "somehow forgot what law it was applying after having announced and expounded it in some detail," *id.* at 16. After observing that the district judge had long experience with Texas law, and noting the Fifth Circuit's longstanding position that "the views of such jurists as to state law are deserving of great weight," the court concluded that "[b]y a parity of reasoning, we are entitled to assume a general knowledge of that law on the part of such a magistrate, certainly of its basic principles." *Ibid.* Alternatively, the court found that "on this point the law of Louisiana is uncharacteristically the same in general import as the law of Texas" and hence that "[even] had the trial court followed Louisiana law[,] no harmful error would have accrued." *Id.* at 16–17.

The court of appeals likewise rejected the claims that the district court had applied the "long-defunct" doctrines of last clear chance and discovered peril and had treated the flight crew's actions as a new and independent cause of the crash. Pet. App. 17–18. The court of appeals regarded it as "most unlikely" that "the court was ignorant (and uninformed by counsel) of a decade's developments in Texas tort law" concerning those doctrines. *Id.* at 17. Instead, the court concluded that the district court's statements on which petitioners' relied were "simply observations along the way" to the district court's ultimate determination that

the flight crew's negligent actions were the sole proximate cause of the crash. *Ibid.*

Finally, the court of appeals rejected petitioners' "objective standard" argument. It did so implicitly rather than explicitly, repeating the district court's reliance on the behavior of the Delta flight crew rather than trying to gauge (as petitioners urged) the hypothetical behavior of a "reasonably prudent" flight crew unaware of actual weather conditions. Pet. App. 18–19 & n.6. The court of appeals therefore accepted the district court's view that "when [the flight crew] chose to fly into a thunderstorm at a low altitude and speed[,] it chose to dice with death." *Id.* at 18.

3. Petitioners filed a petition for rehearing on January 15, 1991, which the court of appeals denied without opinion on January 29, 1991. Pet. App. 23–24. At the same time, the court of appeals denied a concurrent motion by petitioners to certify the "objective standard" issue to the Texas Supreme Court.

ARGUMENT

Under this Court's recent decision in *Salve Regina College* v. *Russell*, 111 S. Ct. 1217 (1991), contested determinations of state law by federal district courts must be reviewed *de novo* by courts of appeals. The petition in this case rests on the claim that the court of appeals did not review the district court's rulings regarding the Texas law of proximate cause *de novo*. That claim is demonstrably wrong. Accordingly, remanding the case to the court of appeals for reconsideration in light of *Salve Regina* would serve no purpose.

The standard of review actually employed by the court of appeals is explicitly set forth in the court's opinion. As noted above, the court of appeals stated that "the law applied by the district court [in making the proximate cause determination] is reviewable *de novo*." Pet. App. 12. The court reiterated that point later, stating that "[w]e review * * * claims of legal error *de novo*." *Id.* at 15. It is hard to imagine how a

court of appeals could state more clearly its intention to resolve all issues of law, including issues of state law, under a *de novo* standard of review.

In arguing that the court of appeals nonetheless deferred to the district court, petitioners ask this Court to assume that the court of appeals was not candid when it set forth the standard of review it would apply. This Court rejected just such a request in *Salve Regina* itself. In *Salve Regina*, the Court was presented with an argument that courts of appeals which claimed to defer to district courts were actually conducting *de novo* review. See 111 S. Ct. at 1223. The Court expressly "decline[d] the invitation to assume that courts of appeals craft their opinions disingenuously." *Ibid.* Here, too, there is no basis to assume that the court of appeals framed its opinion disingenuously, professing to employ *de novo* review while surreptitiously deferring to the district court.

Indeed, even if the court of appeals had been inclined to employ the deferential standard of review disapproved in *Salve Regina*, it would have had little occasion to do so. In large measure, the legal (as opposed to factual) dispute between the parties focused not on what the governing Texas rules of proximate cause are, but on whether the district court's decision employed those rules. For their part, petitioners argued that the district court relied on Louisiana rather than Texas law, Pet. App. 13, and employed negligence doctrines like "last clear chance" and "discovered peril" which had been repudiated by the Texas Supreme Court, *id.* at 14. In contrast, the United States argued that the district court faithfully adhered to Texas law and did not rely on the repudiated doctrines singled out by petitioners. See, *e.g.*, Gov't C.A. Br. 41–43, 46–47. When the dispute before a court of appeals is not over the governing terms of state law but instead over the district court's adherence to those terms, the appellate practice condemned by this Court in *Salve Regina*—that of deferring to a district court's judgments about

"unsettled question[s] of state law," 111 S. Ct. at 1225—simply does not come into play.

Placed in this context, the passages in the court's opinion relied upon by petitioners, see Pet. 12, 13–14, plainly do not conflict with *Salve Regina*. While the court of appeals "assume[d] a general knowledge" of "basic principles" of Texas law on the part of the district court, Pet. App. 16, it did so only to establish that the district court had applied Texas law rather than Louisiana law, *id.* at 16–17, not to resolve a dispute over what Texas law requires.[2] By the same token, when the court of appeals declined "to assume that the [district] court was ignorant (and uninformed by counsel) of a decade's developments in Texas tort law," Pet. App. 17, it was not deferring to the district court's assessment of Texas law, but instead concluding that the district court had not employed negligence doctrines which Texas law no longer recognizes, *ibid.*

For present purposes, the only significant respect in which the parties disagreed over the applicable legal standards in the court of appeals concerned petitioners' claim that Texas law requires an "objective standard" of proximate cause. See p. 3, *supra*.[3] Here petitioners' reliance on *Salve Regina* is especially weak, for there is no indication of any kind that the court of appeals deferred to the district court in rejecting this claim. Indeed, the court of appeals could not have done so, for as petitioners themselves concede, they never briefed the issue before the district court, Pet. 15, and

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[2] The court here noted "the view of our Circuit that the views of * * * jurists [like the trial judge] as to state law are deserving of great weight." Pet. App. 15–16. But the court did so only to provide an analogy ("[b]y a parity of reasoning") for its assumption that the district court possessed a "general knowledge" of the "basic principles" of Texas law, *id.* at 16 —not, as petitioners suggest, to resolve an unsettled issue of Texas law.

[3] Petitioners now characterize this claim as their "central argument" (Pet. 9–10) before the court of appeals. The claim occupied four pages of petitioners' 48–page principal brief below. See Pet. C.A. Br. 35–39.

the district court's opinion "never mentioned or considered" it, Pet. 11.[4]

Petitioners point to a passage in the court's opinion which purportedly shows appellate deference on the objective-standard issue, Pet. 12, but the passage on which they rely, see Pet. App. 15–16, is taken entirely out of context. It actually relates to the district court's supposed reliance on Louisiana rather than Texas law, see p. 5, *supra*, not to the choice between objective and subjective standards of proximate cause. Absent some affirmative showing that the court of appeals engaged in deferential review on the objective-standard issue, it can only be assumed that here, as elsewhere, the court of appeals adhered to its stated conviction that "the law applied by the district court is reviewable *de novo*." Pet. App. 12.

Petitioners also argue at some length that adoption of an objective standard of proximate cause would have compelled a judgment in petitioners' favor, Pet. 10–11, 16, and that the United States never disputed that it would be liable if an objective standard were applied, *id.* at 16 n.32. Although this argument is not directly relevant to the petition, we note briefly that it is simply incorrect. Far from conceding liability under an objective standard, the United States explicitly argued below that "[u]nder either a subjective *or* an objective standard, Delta has failed to meet its burden of proof to show that a [weather] warning [by air traffic controllers] would have made any difference." Gov't C.A.

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[4] At several points, petitioners appear to suggest that the court of appeals simply did not resolve this claim. See Pet. 12 ("The opinion * * * never addressed that critical issue."). The court of appeals expressly included the claim in its exposition of petitioners' position on appeal, Pet. App. 15, and while the court did not go on to reject the claim in explicit terms, it hardly follows that the court failed to do so implicitly. Cf. *Knotts* v. *United States*, 893 F.2d 758, 761 (5th Cir. 1990). In any event, petitioners' suggestion that the court of appeals failed to resolve the claim altogether is at odds with their argument that the court of appeals resolved the claim by deferring to the district court.

Br. 38 (emphasis added). As the United States explained to the court of appeals, "[a]ssuming arguendo [that] an objective standard were to be applied," the record before the district court simply did not establish that a warning to another flight crew would have led to a different result under the circumstances existing at the time of the accident. *Id.* at 37–38. Thus, it by no means follows that petitioners would have prevailed if the court of appeals had employed their objective-standard test.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioners also err in claiming (Pet. 15) that in the proceedings before the district court, the United States "contested the fact issue of its level of knowledge [but] not the causal effect of that knowledge once established." Both before and during the trial, the United States asserted that any negligence on the part of the air traffic controllers was not causally connected to the crash. See, *e.g.*, Memorandum of United States in Support of Motion for Summary Judgment at 18–30, *In re Air Crash at Dallas/Fort Worth Airport on August 2, 1985*, MDL No. 657 (N.D. Tex. Sept. 17, 1987).

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